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Suzanne Lee and Nathan Lee Garza v. Dr. Lynn Gaufin : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

SUZANNE LEE and NATHAN LEE GARZA, through his guardian, SUZANNE LEE, Plaintiff-Appellant, vs. DR. LYNN GAUFIN, Defendant-Respondent.	900925 Case No. 20995 and Case No. 21063

APPELLANT'S BRIEF

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IN THE UTAH SUPREME COURT

SUZANNE LEE and NATHAN LEE GARZA, through his guardian, SUZANNE LEE, Plaintiff-Appellant, vs. DR. LYNN GAUFIN, Defendant-Respondent.	MEMORANDUM OF NEWLY UNCOVERED AUTHORITY Case Nos. 20995 and 21063 Category No. 13.b.

The plaintiff-appellant cites as newly uncovered authority the case of Strahler v. St. Luke's Hospital, 706 S.W.2d 7 (Mo. banc 1986). Strahler, a nineteen-year old plaintiff, alleged that she had received negligent medical treatment four years prior to filing the suit. Id. at 8. Missouri law barred action against any health care provider unless brought within two years of the date of occurrence. The statute protected the claims of infants until their tenth birthday when the statute began to run. Id. In Missouri, minors lack capacity to institute, civil lawsuits in their own right. Id. at 9. The Missouri Constitution

provides that "the courts of justice shall be open to every person, and certain remedy afforded for every injury to person. . ." Mo. Const., art. I, §14.

The Court found that minors have a constitutionally protected right of access to the Court even though their parents or guardians may fail to protect the child's interests. Id. at 11. This is the argument made by Appellant at Point I of his Brief and Point I of his Reply Brief.

The Court states that "the method employed by the [Missouri] legislature to battle any escalating economic and social costs connected with medical malpractice litigation exacts far too high a price from minor plaintiffs like Carol Strahler and all other minors similarly situated." Id. The appellant argues identically at Point II of his Brief and Points II and III of his Reply Brief.

DATED this 11 day of Aug, 1986.

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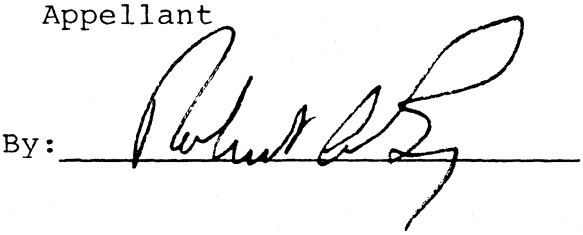
By: 

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing MEMORANDUM OF NEWLY UNCOVERED AUTHORITY, (Lee/Garza v. Gaufin), was mailed, U.S. Mail, postage prepaid, this 11th day of August, 1986, to the following:

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IN THE UTAH SUPREME COURT

SUZANNE LEE and NATHAN LEE GARZA, through his guardian, SUZANNE LEE, Plaintiff-Appellant, vs. DR. LYNN GAUFIN, Defendant-Respondent.	Case No. 20995 and Case No. 21063

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STATEMENT OF ISSUES

1. As applied to minors, does Utah Code Annotated, §78-14-4, (1953 as amended) violate the Open Courts provision contained in Article I, Section 11, of the Utah Constitution.

2. As applied to minors, does Utah Code Annotated, §78-14-4, (1953 as amended) violate the equal protection guarantee contained in Article I, Section 24 of the Utah Constitution.

3. Does Utah Code Annotated, §78-14-4, (1953 as amended) violate either the due process clause of the Utah Constitution or the equal protection clause of Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Through his guardian, plaintiff-appellant, Nathan Lee Garza, seeks review of a ruling by Judge Cullen Christensen of the Fourth Judicial District Court granting defendant's Motion to Dismiss his claims. The trial court ruled that Nathan's suit was not timely filed under the provisions of Utah Code Annotated, §78-14-4 (1953, as amended).

FACTS

Nathan Lee Garza was not even a year old when his mother first took him to Dr. Lynn Gaufin, a neurologist (R. 29). Dr. Gaufin saw Nathan on August 13, 1980, August 29, 1980, and October 24, 1980, for shaking spells (R. 13). Dr. Gaufin diagnosed Nathan's condition as encephalomyelitis (R. 29).

About nine months after his first visit to Dr. Gaufin, another physician told plaintiff's mother that Nathan had hydrocephalus, not encephalomyelitis (R. 30). Hydrocephalus, or water on the brain, is treatable if caught in time (R. 87).

But by the time plaintiff's condition was correctly diagnosed and treated, pressure from the hydrocephalus had already caused brain damage (R. 30, 87). Because Dr. Gaufin failed to properly diagnose and treat plaintiff, Nathan is now retarded and will be handicapped for life (R. 31, 87). He is now six years old (R. 30).

Nathan's father left the family when he realized the extent of Nathan's handicap (R. 30). Nathan's mother, Suzanne Lee, had to work to provide for her family. She bore the burden of caring for Nathan and his younger brother alone.

Mrs. Lee began the malpractice process by filing a Notice of Claim on May 6, 1983 (R. 12, 30). Under the discovery rule, this filing may have been timely. But,

because of all the pressure she was under, Mrs. Lee instructed her attorneys to discontinue the litigation (R. 30, 33). They complied. New attorneys served a new notice on November 9, 1984 (R. 12). This action was filed on March 8, 1985 (R. 4).

Defendant moved to dismiss Nathan's claims based upon the two-year statute of limitations and four-year statute of repose set forth in Section 78-14-4 of the Utah Code Annotated. The trial court granted the motion (R. 71-74).

SUMMARY OF ARGUMENT

The Medical Malpractice Act's short 2-year Statute of Limitations is not tolled during minority. All other statutes of limitations are tolled for minors. The Medical Malpractice Act's short four-year statute of repose is not tolled for minority either. Consequently, the Medical Malpractice Act takes away the rights of those minors whose guardians do not act quickly for them to recovery for their injuries.

The Open Court's provision in our State's Constitution seeks to preserve the basic notion that one who inflicts injury ought to be responsible for the damage he causes. Under that provision, common law rights cannot be

totally taken away without providing a substitute unless there is a showing of real need and a showing that the means used to meet that need is reasonable and appropriate. It is not necessary to preserve medical care to take away the right of a minor to recover for medical malpractice. In addition, the multitude of special legislation which exists to deal with the alleged medical malpractice crisis proves that less drastic steps can be taken.

Minors in medical malpractice cases are treated differently than all other injured minors. This discrimination violates the equal protection provisions of Utah's Constitution. Any positive benefit which such discrimination would have to the medical profession as a whole is so tenuous that this particular form of discrimination cannot withstand even the most minimum equal protection standard. The legislation certainly could not withstand the higher scrutiny given the rights which have some Constitutional status. Under our State's Constitution, the right to recover for one's injuries is such a right.

Minors are also treated differently than adults in the medical malpractice context. Adults have a discovery period. Unless someone takes action for them, young minors do not have a real discovery period.

ARGUMENT

I

AS APPLIED TO MINORS, SECTION 78-14-4 VIOLATES THE OPEN COURTS-INJURY REDRESS PROVISION OF UTAH'S CONSTITUTION

Berry v. Beach Aircraft Corp., 25 Utah Adv. Rep. 30 held that Article I, Section 11 of the Utah Constitution places meaningful restrictions on the legislature's power. Specifically, Berry held that legislation which abrogates a common law right without creating an adequate substitute is unconstitutional unless "there is a clear social or economic evil to be eliminated[1] and the elimination of a remedy is not an arbitrary or unreasonable means for achieving the objection." Id at 36.

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[1]Given the court's holding in Berry v. Beach Aircraft, supra and the court's comment in Malan v. Lewis, 693 P.2d 661, 671 (Utah 1984) on the propriety of premium reduction as a justification for disparate treatment of classes, legislation abrogating the right to bring an action to reduce premiums would not be valid, at least absent a finding that insurance is not available at prices which make an affected business sector viable. Even then, the means chosen needs to be examined for reasonableness and the lack of less drastic alternatives. Justice has its cost. The notion of fundamental justice is interwoven into the fabric of our society and our State Constitution. Before cutting premiums can become a legitimate reason for eliminating the right to maintain an action for one's injuries, something significantly more than a mere desire to reduce premiums must be shown.

Because the issues in this case can be resolved on other grounds, there is probably no need to reach the issue. But it is not without significance that Arneson v. Olsen, 270 N.W.2d 125 (N.D. 1978) and Boucher v. Sayeed, 459 A.2d 87 (R.I. 1983) found that no medical malpractice insurance crisis existed during the relevant time period.

At least as applied to minors, the non-tolling requirement and statute of repose in Section 78-14-4 violate Article I, Section 11 of Utah's Constitution. Rule 17 of the Utah Rules of Civil Procedure prevents minors from filing suit on their own behalf. Of course, young children are inherently unable to comprehend their legal rights. By imposing additional restrictions on top of a minor's mental and legal disabilities, Utah's Medical Malpractice Act effectively abrogates the common law right a minor has to recover for personal injuries unless that minor is fortunate enough to have a guardian who effectively pursues the claim for him. Section 78-14-4 thereby closes the courthouse door to the very people that need the law's protection the most.

As applied to minors, neither the Medical Malpractice Act's anti-tolling provision nor the four year statute of repose satisfy the test which Berry v. Beach Aircraft set for statutes which effectively abrogate a person's common law right. Studies show that less that one-seventh (1/7) of all medical malpractice claims involve minors. Jenkins, California's Medical Injury Compensation Reform Act on Equal Protection Challenge, 52 So. Cal. L.Rev. 829, 960-961 (1979). Those same studies show that 90% of all medical malpractice claims are discovered within four years. (Id.) Courts have recognized that most claims of minors will be brought quickly. Barrio v. San Manuel Division Hospital for Magna Copper Company, 692 P.2d 280, 286 (Ariz. 1984). Obviously, any effect that the "long-tail" claims of minors have on the medical profession

would be de minimus.[2] There certainly has been no showing that a minor's long-tail claims have a meaningful effect on the medical industry as a whole in Utah.

As recent history has shown, there is no shortage of alternative ways to deal with the alleged crisis.[3]

Other alleged reasons for this devastating treatment of minors have been advanced by an articulate industry. But the test set forth in Berry v. Beach Aircraft is a strict weighing test. Reasons need to be examined for merit and weighed against fundamental justice.

For example, defendant has argued that the statute of repose is needed to prevent fraud and situations where critical evidence may have been lost over time. But that does not significantly distinguish medical malpractice claims

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[2]To the extent that there is any increase in premiums at all, that increase will likely be offset, at least in catastrophic cases, by increases in welfare. The net effect to the tax-paying, bill paying public will be even more de minimus than any conjectural effect on premiums.

[3]These include the abolition of the collateral source rule (Section 78-14-4.5, Utah Code Annotated, adopted in 1985), and the prelitigation review panel (Section 78-14-12, adopted in 1985), as well as the recent more controversial enactments. Not only do these changes show that there are alternatives to eliminating claims altogether, they also show that the legal climate has changed since Section 78-14-4 was enacted. Such changes may be considered in considering the constitutionality of older legislation. Malan v. Lewis, 693 P.2d 661, 669 (Utah 1984); Stone v. Department of Registration, 567 P.2d 1115, 1117 (1977).

from all other types of claims. Moreover, it is plaintiff's burden to prove the facts. The lost records and faded memories are as important to the victim as they are to the doctor. Significantly, this court has consistently ruled that the stale claims considerations are outweighed by the unfair effect which the total elimination of rights can have on a minor. Switzer v. Reynolds, 606 P.2d 244 (Utah 1980); Szaval v. Sandoval, 636 P.2d 1082 (Utah 1981); see also Myers v. McDonald, 635 P.2d 84 (Utah 1981).

II

AUTHORITIES DIRECTLY ON POINT HOLD SIMILAR STATUTES TO BE UNCONSTITUTIONAL UNDER OPEN COURT PROVISIONS

Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983) applied the same test set forth in Berry v. Beach Aircraft, supra to invalidate a similar anti-tolling provision in that state's medical malpractice legislation. Under Texas' Open Court's Provision, the Court declared that the anti-tolling provision was unreasonable and that the child's right to justice outweighed the legislation's purposes. Addressing the argument that parents will adequately protect the child's right, the court stated:

> This Court, however, cannot assume that parents will act in such a manner. It is neither reasonable nor realistic to rely on parents, who may themselves be minors, or who may be ignorant, lethargic, or lack concern, to bring a malpractice suit within the time provided.
> (648 S.W.2d 661 at 667).

The facts of this case illustrate how apt such reasoning is. Nathan's father left when he understood the extent of his handicap (R. 30). His mother, who had to bear the burden of caring for the family alone, could not stand the pressure and instructed attorneys to drop the case. (R. 30, 33).

The Arizona Supreme Court agreed that a guardian's ability to bring a child's claim for him is not an adequate safeguard. Invalidating the part of Arizona's medical malpractice act which required minors injured before age seven to bring their action before they were ten, the Arizona Supreme Court stated:

> We are well aware that where a chance of substantial recovery exists, there is no lack of advocates willing to undertake appropriate procedures to find and appoint a guardian ad litem or to obtain a "next friend" so that the action may be brought. While the vast majority of claims on behalf of injured minors will still be brought within a relevantly short time after the injury occurs, this all depends upon good fortune; the minor himself is helpless, particularly when under ten years of age. The minor possesses a right guaranteed by the constitution, but cannot assert it unless someone else, over whom he has no control, learns about it, understands it, is aware of the need to take prompt action, and in fact takes such action.
>
> We recognize, also, that some children are without parents or have parents who do not fulfill commonly accepted parental functions. The statute makes no exception for children who have unconcerned parents, children in foster care, or those in institutions; . . .

> As to parents themselves, some are lazy or frightened or ignorant or religiously opposed to legal redress. Still, they have their remedy available to them if they choose to use it. The child does not.
>
> Barrio v. San Manuel Division Hospital for Magna Copper Co., 692 P.2d 280, 2985-296 (Ariz. 1984).

The Utah Supreme Court's analysis of the argument that the minor can be represented by a guardian is similar. Ruling that the general tolling provisions for minority had to be applied to the Governmental Immunity Act's Notice of Claims provision, the Court stated:

> The parents or natural guardians have no specific legal duty to perform and have no responsibility to their minor offspring other than their moral obligation. Consequently, in matters of this kind, when a parent, natural guardian fails, for one reason or another to give notice, file suit, or otherwise protect the minor's legal interests, the minor is left completely without a remedy.
>
> Scott v. School Board of Granite School District, 568 P.2d 746, 747 (Utah 1977).

This Court then stated that any ruling prohibiting the general tolling provisions for minority from applying to the notice of claim requirement would work "a denial of due process and equal protection." Id. at 568. Since Article I, Section 11, has been interpreted as giving a degree of substantive due process protection, presumably, this is one of the provisions that the court had in mind.

In any event, Berry v. Beach Aircraft, supra which invalidated our products liability statute of repose held that Article I, Section 11 limits legislative power to

arbitrarily curtail one's right to bring a personal injury action. Berry and Sax v. Votteler, supra, shows that the anti-tolling requirement and the imposition of the statute of repose in Section 78-14-4 during minority[4] violate Article I, Section 11 of Utah's Constitution.

III

AS APPLIED TO MINORS,
SECTION 78-14-4 DOES NOT SATISFY
UTAH'S RATIONAL BASIS EQUAL PROTECTION TEST

Malan v. Lewis, 693 P.2d 661 (Utah 1984) defined Utah's equal protection rational basis test. Malan held that classifications must reasonably promote legitimate legislative objectives. (Id. at 670.) Malan further held that classifications under this test would be subject to a

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[4]For the purposes of this case, the Court need not decide whether the statute of repose in its entirety is unconstitutional. The Court need only decide whether its bar can be applied during a victim's minority. But the four year medical malpractice statute is more discriminatory than the six year products liability statute. About 10% of the potential medical malpractice claims are not even discovered by the end of that period. Jenkins, California's Medical Injury Compensation Reform Act on Equal Protection Analysis, 52 So. Cal. L.Rev. 829, 960-961 (1979). It then takes time to decide to go to an attorney. Because medical malpractice claims are fiercely resisted and costly to prosecute, it takes even more time for an attorney to decide to bring such an action.

Unlike most products liability claims, medical malpractice claims inherently require some discovery period, especially to discover the "legal injury." Like some products, some forms of medical malpractice will take time before even the physical injury manifests itself. The shorter four years statute is then imposed upon a shortened statute of limitations, a bewildering array of procedural necessities and substantive changes to the common law.

degree of judicial scrutiny. That case expressly stated that it is unconstitutional to single out a group "on the basis of a tenuous justification that has little or no merit." (Id. at 671.) Section 78-14-4 discriminates between children injured by health care providers and children injured by all other tort-feasors.[5] As has been discussed, the relationship between the Act's alleged purposes and this discrimination is "tenuous" and of "little or no merit."

The Utah Supreme Court has already demonstrated its belief that the "stale claim" argument should not stand in the way of justice. Switzer v. Reynolds, 606 P.2d 244 (Utah 1980); Szaval v. Sandoval, 636 P.2d 1082 (Utah 1981); Myers v. McDonald, 635 P.2d 84 (Utah 1981). Significantly, Malan rejected a fraudulent claims argument applying the equal protection rational basis test. Malan v. Lewis, 693 P.2d 661, 674 (Utah 1984).

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[5]The legislation also discriminates between adults injured by medical malpractice and children who have medical malpractice claims. The discrimination is subtle but real. Under the statute, adults are given a period of time to "discover" their legal injury for themselves and to take appropriate action.

In reality, children cannot "discover" their injury because they cannot comprehend it. If they are young enough and no one takes action for them, they have no discovery period.

The act also provides exceptions to the two-year statute of limitations and the four-year statute of repose when there is a foreign body and when there is concealment. The failure to give minors a similar exception itself violates equal protection. Malan v. Lewis, 693 P.2d 661, 673 (Utah 1984).

With respect to the alleged need to impose severe restrictions on minors to reduce premiums, the effect of Section 78-14-4 can only be de minimus. Any such effect would be offset to a degree by welfare, and is merely cumulative in light of all the other medical malpractice legislation that has been enacted. The need to discriminate against minors is therefore of "little or no merit" and does not satisfy Malan's rational basis test. Malan's directive that arbitrary classifications not be used just to lower premiums hammers that point home.

Scott v. School Board of Granite School District, 568 P.2d 746 (Utah 1977) supports the contention that such discriminatory treatment of minors violates Utah's equal protection clause. Although that case did not involve the precise issues here, it expressly stated that failure to apply the general tolling provisions to the Governmental Immunity Act's notice provisions would "work a denial of equal protection." (Id. at 748). Other states have similarly held that failure to apply tolling provisions to similar notice requirements violates equal protection guarantees. Tafoya v. Doe, 670 P.2d 582 (N.M. App. 1983); Hunter v. North Mason High School, 529 P.2d 898 (1974), aff'd. 539 P.2d 845 (Wash. 1975).[6]

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[6]Boucher v. Sayeed, 459 A.2d 87 (R.I. 1983) utilized the rational basis test to find Rhode Island's entire Malpractice Act unconstitutional, apparently on the grounds that the alleged crisis was not significant.

IV

UNDER UTAH'S CONSTITUTION, THE RIGHT TO BRING A PERSONAL INJURY ACTION IS A RIGHT THAT IS ENTITLED TO HEIGHTENED EQUAL PROTECTION REVIEW

The United States Supreme Court has held that satutes affecting rights "explicitly or implicitly guaranteed by the Constitution" are tested under the strict scrutiny standard for equal protection purposes. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 33-34 (1973). To be sure, the right to bring a personal injury action is not a fundamental right under the U.S. Constitution. But, applying the same basic test under our State's Constitution would result in a heightened equal protection scrutiny. The right to bring a personal injury claim is protected under Utah's Constitution.

Years ago, the Utah Supreme Court characterized the right to bring a tort claim as a "substantial right." Bracken v. Dahle, 251 P. 16 (Utah 1926). The Court's recent decision in Berry v. Beach Aircraft Corp., supra, confirms the fact that common law tort rights are of Constitutional dimensions in Utah. The equal protection test when such rights are affected should not be less stringent than the test applied under Article I, Section 11 of Utah's Constitution.

Whether that test is a "strict scrutiny test," a "scrutiny" test,[7] or something in between is not a decisive issue. Under any heightened standard of review,[8] the discriminating effect which Section 78-14-4 has on minors cannot stand.

Using an intermediate test, New Hampshire's Supreme Court in Carson v. Maurer, 424 A.2d 825 (N.H. 1980) invalidated the part of a medical malpractice act which specified that the state's general statute of limitation tolling provisions for minors did not apply to medical malpractice claims. Although it did not declare the right to bring a personal injury action to be a "fundamental right" the Court characterized such a right as an "important substantive right" which is "sufficiently important to require that restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed

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[7]Under the United States Constitution, the "strict scrutiny test" requires that the classification be necessary to promote a compelling that interest Plyler v. Doe, 457 U.S. 202, 217 (1982). The middle level or "scrutiny" test is whether the classification is substantially related to a legitimate government interest. Reed v. Reed, 404 U.S. 71 (1971).

[8]The Utah Supreme Court has not decided whether children are a "discreet and insular" minority justifying treatment under some form of heightened scrutiny. In illegitimacy cases, the United States Supreme Court has given middle level scrutiny to legislation affecting minors. Mills v. Habluetzel, 456 U.S. 91 (1982). The combination of minority plus the importance of education triggered the middle-level "scrutiny" test in Plyler v. Doe, 457 U.S. 202 (1982). Such cases indicate that the U.S. Supreme Court is really applying a sliding scale analysis to equal protection challenges though a majority has yet to admit as much. If that right to bring a personal injury action by

(Footnote Continued)

under the rational basis test." (Id. at 830.) In determining the constitutionality of New Hampshire's Malpractice Act, the court applied the following test:

> Whether the malpractice statute can be justified as a reasonable measure in furtherance of the public interest depends upon whether the restriction of private rights sought to be imposed is not so serious that it outweighs the benefits sought to be conferred upon the general public.
> (Id. at 831.)

Holding that elimination of the tolling provisions for a minor's medical malpractice claims did not satisfy that test, the court found that the discrimination did not substantially further the legislative objective because of the small number of claims that would be affected. It further held that the non-tolling provision unfairly burdened medical malpractice claimants. (Id. at 834.)

Idaho used an intermediate "means-focus" test in Jones v. State Board of Medicine, 555 P.2d 399 (Id. 1976) to determine the constitutionality of Idaho's medical malpractice legislation. Before remanding the case for factual findings, the Supreme Court held that the intermediate means-focus test should be applied for equal protection analysis. On remand, the District Court held, the special statute of limitations applicable to minors

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(Footnote Continued)
itself is not enough to trigger a higher standard of equal protection review, the combination fo the right plus minority should under our State Constitution.

unconstitutional. Jones v. State Board of Medicine, Nos. 55527 & 55586 (4th Dist. Idaho 1980).

In Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978), the North Dakota Supreme Court struck down that state's entire malpractice act. The court in Arneson utilized the intermediate test for equal protection analysis.

For the reasons stated in the discussion on the Malan rational basis test, the discriminatory effect which Section 78-14-4 has on minors would not withstand any level of heightened scrutiny.

CONCLUSION

As applied to minors, the Medical Malpractice Act's anti-tolling provision and statute of repose are unconstitutional. Those provisions violate the Open Court's declaration of the Utah Constitution and the Constitution's prohibition against discriminatory legislation. Without need and in spite of less drastic alternatives, this special legislation violates important guarantees of fundamental fairness. The District Court's ruling should be reversed. The case should be remanded to consider the merits.

DATED this 15 day of May, 1986.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Suzanne Lee,
natural guardian of
Nathan Garza

By: _____
DAVID M. JORGENSEN

CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing APPELLANT'S BRIEF, (Lee/Garza v. Gaufin), was mailed, U.S. Mail, postage prepaid, this 18 day of March, 1986, to the following:

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APPENDIX

APPENDIX

RELEVANT STATUTORY PROVISIONS

The relevant part of Section 78-14-4, Utah Code Annotated, (1953 as amended) reads as follows:

> (1) No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect or occurrence, except that:
>
> (a) In an action where the allegation against the health care provider is that a foreign object has been wrongfully left within a patient's body, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered, the existence of the foreign object wrongfully left in the patient's body, whichever first occurs; and,
>
> (b) In an action where it is alleged that a patient has been prevented from discovering misconduct on the part of a health care provider because that health care provider has affirmatively acted to fraudulently conceal the alleged misconduct, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence, should have discovered the fraudulent concealment, whichever first occurs.

(2) The provisions of this section shall apply to all persons, regardless of minority or other legal disability under Section 78-12-36 or any other provision of the law, and shall apply retroactively to all persons, partnerships, associations and corporations and to all health care providers and to all malpractice actions against health care providers based upon alleged personal injuries which occurred prior to the effective date of this act; provided, however, that any action which under former law could have been commenced after the effective date of this act may be commenced only within the unelapsed portion of time allowed under former law; but any action which under former law could have been commenced more than four years after the effective date of this act may be commenced only within four years after the effective date of this act.

SELECTED RELEVANT CONSTITUTIONAL PROVISIONS

Article I, Section 11 of the Utah Constitution reads as follows:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Article I, Section 24 of the Utah Constitution reads as follows:

> All laws of a general nature shall have uniform operations.

Section 1 of the Fourteenth Amendment to the Constitution of the United States of America reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.